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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1269

JOHN L. BARRY, Commissioner of the Suffolk County Police Department,
*Petitioner,*

v.

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association, and Thomas Dwen, Individually,
*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS AS AMICUS CURIAE

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## MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

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Pursuant to Rule 42(2) of the Court's Rules, the International Brotherhood of Police Officers moves for leave to file the attached brief as *amicus curiae*, in support of the respondent's position. Counsel for peti-

tioner has consented to the filing of this brief, but counsel for respondent has not.

## INTEREST OF THE AMICUS

The International Brotherhood of Police Officers ("IBPO") is the largest independent international union in the United States concentrating on representation of uniformed police officers, with a membership exceeding 25,000. IBPO is the bargaining representative for officers in the District of Columbia and in other police departments on the east and west coasts and in the midwest.

IBPO's members believe that their public responsibilities are compatible with a retention of the personal liberties enjoyed by the general population, and that neither their individual rights nor the public interest are served by militaristic regimentation of the private lives of police officers. Since hair, unlike clothing, cannot be changed, unduly restrictive grooming regulations impinge upon an officer's freedom to determine his own appearance in off-duty as well as duty hours. Moreover, a police officer's dealings with community members while on duty are impaired rather than enhanced by an unusually conservative appearance. IBPO's members therefore strongly object to regulations, such as those at issue in this case, which are calculated to segregate them from the mainstream of contemporary society.

Because the hair-regulation problem is important both in itself and as an exemplar of the police officer's role and status in society, IBPO has itself instituted several administrative and judicial proceedings challenging regulations such as those at issue here. Those



proceedings will obviously be affected by the outcome of this case. We seek leave to file the attached brief to demonstrate the nationwide concern with the issue presented in this case and to assist the Court in its consideration of the issue with arguments that may not be presented by respondent.

Respectfully submitted,

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## BRIEF FOR THE INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS AS AMICUS CURIAE

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This brief is submitted by the International Brotherhood of Police Officers, contingent upon the granting of the foregoing Motion for Leave to File Brief as

*Amicus Curiae.* *Amicus* supports the position of respondent and urges the Court to affirm the judgment of the court of appeals. The interest of *amicus* is stated in the foregoing Motion.

In our view, the question presented may more appropriately be stated as follows:

Whether the two courts below properly found certain hair-grooming restrictions upon police officers unconstitutional because of the absence of a "genuine public need" for such restrictions.

## ARGUMENT

We submit that the court of appeals' first opinion (Pet. App. 9a-18a) correctly held (1) "that choice of personal appearance is an ingredient of an individual's personal liberty [protected by the Fourteenth Amendment], and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation" (Pet. App. 17a), (2) that police officers may not be relegated to a "para-military" status that would deny them that liberty (Pet. App. 12a-15a), and (3) that petitioner had not met his burden of demonstrating a "genuine public need" (Pet. App. 18a) for specific restrictions on long hair, sideburns and beards, which "do not provide standards for proper grooming [but] [r]ather * * * do nothing more than demand uniformity" (Pet. App. 7a); claims that the regulations are required for safety, identifiability and esprit de corps are unsubstantiated, making the regulations "an arbitrary limitation and a purposeless restraint" (Pet. App. 8a).

In this brief, we do not seek to answer all of petitioner's arguments (some of which need no answer)



nor to argue respondent's case expansively. We limit ourselves to several major points.

### I. Fourteenth Amendment "Liberty" Encompasses the Right of an Individual to Regulate His Personal Appearance

> "Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500.

Mr. Justice Harlan elaborated upon the concept in his separate opinion in *Poe* v. *Ullman,* 367 U.S. 497, 543 (dissenting from dismissal of the appeal):

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints * * * and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." (Citations omitted.)

As that same opinion observed, the error of the now discredited "substantive due process" decisions of the past was not in their basic concept but in the stand-

ards applied in determining whether the right had been infringed in the economic sphere (367 U.S. at 517-518). Thus, Mr. Justice Holmes' dissent in *Lochner* v. *New York,* 198 U.S. 45, 76, properly left room for the situation where "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

The concept of "liberty" has been broadly defined to encompass "freedom of personal choice in matters of marriage and family life" in all their ramifications (see, *Cleveland Board of Educ.* v. *LaFleur,* 414 U.S. 639-640), as well as the "right to travel" (*Kent* v. *Dulles,* 357 U.S. 116, 126); see also, *e.g., Union Pac. Ry.* v. *Botsford,* 141 U.S. 250, 251; *Stanley* v. *Georgia,* 394 U.S. 557, 564. The generality of the concept is further evidenced by the Court's characterization of the right recognized in *Kent* as one "as close to the heart of the individual as the choice of what he eats, *or wears,* or reads" (357 U.S. at 126, emphasis added). And almost a hundred years ago, Judge Cooley commented as follows on Mr. Justice Field's opinion (on circuit) in what was doubtless the first of the "hair" cases:

> "No better illustration of one's rightful liberty in this regard can be given than the fashion of wearing the hair. If the wearing of a [Chinaman's] queue can be made unlawful, so must be the wearing of curls by a lady or mustache by a beau, and the state may at its discretion fix a standard for hair dressing to which all shall conform. The conclusive answer to any such legislation is that it meddles in that which is no concern of the state and therefore invades the private right." Cooley, 18 Amer. Law Reg. 685, commenting on *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. 252, No. 6,546 (C.C.D. Cal. 1879).



In recent years, there have been numerous lower court decisions relating to hair-grooming regulations, mostly in public schools and colleges; nine of the courts of appeals have found a constitutional protection, with only two courts (in decisions dating from 1970 and 1971) denying it.[1] Judge Coffin's opinion in *Richards* v. *Thurston,* 424 F.2d 1281 (1 Cir. 1970), is perhaps the best articulated:

> "[L]iberty seems to us an incomplete protection if it encompasses only the right to do momentous acts, leaving the state free to interfere with those personal aspects of our lives which have no direct bearing on the ability of others to enjoy their liberty. * * * Indeed, a narrower view of liberty in a free society might, among other things, allow the state to require a conventional coiffure of all its citizens, a governmental power not unknown in European history.
>
> "We think the founding fathers understood themselves to be limiting the government's power to intrude into this sphere of personal liberty by reserving some powers to the people. * * * The founding fathers wrote an amendment for speech and assembly; even they would not deem it necessary to write an amendment for personal appearance. We conclude that within the commodious

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[1] Cases recognizing the right: *Richards* v. *Thurston,* 424 F.2d 1281, 1284 (1 Cir. 1970); *Dwen* v. *Barry,* 483 F.2d 1126 (2 Cir. 1973); *Stull* v. *School Board,* 450 F.2d 339, 347 (3 Cir. 1972); *Massie* v. *Henry,* 455 F.2d 779, 783 (4 Cir. 1972); *Lansdale* v. *Tyler Jr. College,* 470 F.2d 659, 662 (5 Cir. 1972), *cert. denied,* 411 U.S. 986; *Breen* v. *Kahl,* 419 F.2d 1034, 1036 (7 Cir. 1969), *cert. denied,* 398 U.S. 937; *Bishop* v. *Colaw,* 450 F.2d 1069, 1075 (8 Cir. 1971); *Freeman* v. *Flake,* 448 F.2d 258, 261 (10 Cir. 1971); *Brown* v. *D.C. Transit,* No. 73-2089 (D.C. Cir. 1975). Cases not recognizing the right: *Jackson* v. *Dorrier,* 424 F.2d 213, 216 (6 Cir. 1970), *cert. denied,* 400 U.S. 850; *King* v. *Saddleback Jr. College District,* 445 F.2d 932, 940 (9 Cir. 1971).

concept of liberty, embracing freedoms great and small, is the right to wear one's hair as he wishes." 424 F.2d at 1284-1285 (footnotes omitted).[2]

**II. The Shape and Length of Police Officers' Hair Can Be Regulated Only to the Extent Justified by Valid Public Needs**

This Court has recently held in *Cleveland Board of Educ.* v. *LaFleur, supra,* that public employee regulations "must not needlessly, arbitrarily, or capriciously impinge upon" Fourteenth Amendment liberties (414 U.S. at 640) and must have a "rational relationship to [a] valid state interest" (*id.* 643). The *LaFleur* standard is essentially the same as the "genuine public need" standard established for this case in the court of appeals' 1973 opinion (Pet. App. 18a) and applied in the subsequent decisions below. See also, *Richards* v. *Thurston, supra,* 424 F.2d at 1285.

The court of appeals has amply answered petitioner's question-begging argument that police officers have a "para-military" status that somehow automatically deprives them of their Fourteenth Amendment right. See Pet. App. 12a-15a. The civilian tradition of law enforcement under our governmental system distinguishes police officers from members of the armed forces, who belong to "a specialized community governed by a separate discipline from that of the civilian," where "the rights of men * * * must perforce be conditioned to meet certain overriding demands of discipline and duty * * *," and where "there is simply not the same autonomy as there is in the larger civilian community." *Parker* v. *Levy,* 417 U.S. 733, 743-744,

[2] See also, *Board of Selectmen of Framingham* v. *Civil Service Comm.,* — Mass. —, 321 N.E.2d 649, 655 (1974).



751. See *Bence* v. *Breier,* 501 F.2d 1185, 1191-1192 (7 Cir. 1974), *cert. denied,* 419 U.S. 1121. Police work properly emphasizes not blind obedience but individual judgment—a quality that is incompatible with the militaristic regimentation for which petitioner argues. Thus, whatever restrictions may appropriately be placed upon members of the military, it remains true in this respect as in others that "policemen, like teachers and lawyers, are not relegated to a watered down version of constitutional rights." *Garrity* v. *New Jersey,* 385 U.S. 493, 500.[3]

In considering whether there is a sufficiently weighty "public need" to justify such regulations as are here in question, it is of significance that hair restrictions—unlike uniform regulatons and standards of cleanliness—regiment an officer's off-duty hours as well as his duty hours. Obviously, hair length cannot be changed at the end of a tour of duty as clothing can. This factor has appropriately been given weight in the analogous situation presented by school grooming codes and restrictions upon military reservists. *E.g., Richards* v. *Thurston, supra,* 424 F.2d at 1285; *Stull* v.

[3] Mr. Justice Holmes' early epigram that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe* v. *Mayor & Aldermen of New Bedford,* 155 Mass. 216, 220 (1894), has surely lost any validity it might have had as a basis for denying general constitutional rights to public employees without specific job-related justifications. That same court has recently so held in *Broderick* v. *Police Commissioner* Mass. Sup. Jud. Ct., June 4, 1975. This Court has implicitly rejected any such principle not only in *Garrity* and *LeFleur,* but also in such other decisions as *Keyishian* v. *Regents,* 385 U.S. 589, 605 and *Graham* v. *Richardson,* 403 U.S. 365, 374. See also *Perry* v. *Sinderman,* 408 U.S. 593; *Arnett* v. *Kennedy,* 416 U.S. 134, 167 (Powell and Blackmun, J.J., concurring in part), 179 (White, J., concurring in part).

*School Board,* 459 F.2d 339, 345 (3 Cir. 1972); *Breen* v. *Kahl,* 419 F.2d 1034, 1038 (7 Cir. 1969); *Friedman* v. *Froehlke,* 470 F.2d 1351 (1 Cir. 1972); *Garmon* v. *Warner,* 358 F.Supp. 206, 211 (W.D.N.C. 1973); *Harris* v. *Kaine,* 352 F.Supp. 769, 773 n.6 (S.D.N.Y. 1972).

**III. Petitioner's Attempted Justifications for These Hair Regulations Do Not Rise to the Level of Valid Public Needs**

Petitioner advances three purported justifications for the intrustion on personal liberties the hair regulation works.[4] He contends, first, that uniformity of ap-

[4] As amended in 1973, the regulation provides as follows (see Pet. App. 6a, App. E-50):

Grooming Standards 2.16 Members of the Force will be neat and clean at all times while on duty. Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:

Hair A. Hair will be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.

Sideburns B. If a member chooses to wear sideburns, they will be neatly trimmed and tapered. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a clean-shaven horizontal line.

Mustaches C. A short and neatly trimmed mustache may be worn, but will not extend over the top of the upper lip or beyond the corners of the mouth.

Beards D. The face will be clean-shaven other than the wear of the acceptable mustache or sideburns. Beards and goatees are prohibited, except where a Police Surgeon grants a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the skin surface of the face.

Wigs E. Wigs or hair pieces will not be worn while on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfiguration. If under these conditions, a wig or hair piece is worn, it will conform to department standards.



pearance is necessary to the effective performance of the police function because it enhances force morale (Pet. Br. 21-22); second, that the regulations make police officers more readily identifiable by the public (Pet. Br. 17-18, 21); and third, that short hair, short sideburns, short mustaches and no beards are required for safe performance of police officers' duties (Pet. Br. 23-24). Even if these justifications had been so clearly articulated at trial, they do not amount to public *needs* sufficient to warrant intrusion upon police officers' Fourteenth Amendment liberties.

1. As petitioner's only trial witness conceded, there exists no study or survey which shows any impact of uniform appearance on the morale or effectiveness of the force (App. 17). The unsupported opinions of "experts" cannot dispel the greater likelihood that the opposite is the case—that a force secure in its rights and at home in its community would be more effective. Uniformity for uniformity's sake alone is not a public need.

2. There is no evidence that short hair makes policemen significantly more identifiable in a society where ordinary citizens wear their hair in all lengths

and styles, both long and short. Plainly, the uniform, badge and hat (which *can* be donned for duty and then removed) are the primary means of identification and suffice for that purpose. See *Greenwald* v. *Frank*, 40 A.D.2d 717, 337 N.Y.S.2d 225 (1972) (Shapiro, J., dissenting).[5]

3. The "safety" arguments are equally implausible justifications for a regulation precluding any hair below the collar and all sideburns and beards, however short. The two arguments are (1) that an officer can be thrown off balance while making an arrest if his hair is pulled, and (2) that long hair can be blown into an officer's eyes during a pursuit chase in his squad car. The only proof of the first point consisted of a demonstration in which a court reporter with long hair was pulled to the ground by a policeman pulling his hair. But as the record discloses (App. 16), the hair that was pulled was above the collar and thus would not have violated the regulation. The second point was supported by no evidence whatever, and it is difficult to understand how such a hazard could be created by, for example, hair one inch below the collar, a beard or sideburns, or even a ponytail. Even truly long hair could readily be controlled by a wig or inconspicuous hairnet.

We do not argue that hair styles of police officers need be left entirely to the whim of the individual. General standards of neatness and compatibility with community practices would, no doubt, pass constitu-

[5] The public appearance justification is attenuated by the regulation's prohibition on the wearing of wigs (App. E-50). As with the other elements of the regulatory scheme, no proof whatsoever was offered to show that wigs would not accomplish the "uniform appearance" objective. The anti-wig provision makes it impossible for the officer desiring to wear long hair off duty to comply with the short-hair requirement while on duty.



tional muster if fairly applied by those charged with their enforcement. Officers can reasonably be required to have clean and neat hair *while on duty*, just as they can be required to wear a uniform that is clean and neatly pressed. The vice of petitioner's regulations is that they go beyond what is rationally related to law enforcement needs and "needlessly, arbitrarily or capriciously" impose petitioner's predilections for uniformity and a "conservative" appearance.[6]

## CONCLUSION

For these reasons, as well as those stated in respondent's brief and in the opinions below, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[6] Absent a safety reason (which has not been seriously shown), one can properly view with a suspicious eye an edict that condemns the personal appearance of at least one member of this Court, the Solicitor General and numerous members of Congress.